

**STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION**

IN THE MATTER OF THE REQUEST)
FOR REVIEW BY:)

DENNIS I. O'RIORDAN,)
Petitioner.)

CHARGE NO.: 2009CF2428
EEOC NO.: 21BA91119
ALS NO.: 10-0310

ORDER

This matter coming before the Commission by a panel of three, Commissioners David Chang, Marylee V. Freeman, and Charles E. Box, presiding, upon Dennis I. O'Riordan's ("Petitioner") Request for Review ("Request") of the Notice of Dismissal issued by the Department of Human Rights ("Respondent")¹ of Charge No. 2009CF2428; and the Commission having reviewed all pleadings filed in accordance with 56 Ill. Admin. Code, Ch. XI, Subpt. D, § 5300.400, and the Commission being fully advised upon the premises;

NOW, **WHEREFORE** it is Hereby **ORDERED**:

- A.** The Respondent's dismissal of Count B and Count C of the Petitioner's charge is **VACATED**.
- B.** Count B and Count C of the charge are **REINSTATED** and **REMANDED** to the Respondent for entry of a finding of **SUBSTANTIAL EVIDENCE** as to both Counts, and for further proceedings consistent with this Order and the Act.

In support of which determination the Commission states the following:

1. The Petitioner filed a charge of discrimination with the Respondent on January 14, 2009. The Petitioner alleged his former employer, Empress Casino ("Employer"), harassed him because of his race, Asian (Count A), subjected him to unequal terms and conditions of employment because of his race, (Count B), and discharged him because of his race, (Count C) in violation of Section 2-102(A) of the Illinois Human Rights Act (the "Act"). On March 26, 2010, the Respondent entered a finding of substantial Evidence as to Count A. Also on March 26, 2010, the Respondent dismissed Count B and Count C of the charge for Lack of Substantial Evidence. On April 20, 2010, the Petitioner filed this timely Request.
2. The Petitioner was employed as a Buffet Cook III.

¹ In a Request for Review Proceeding, the Illinois Department of Human Rights is the "Respondent." The party to the underlying charge who is requesting review of the Department's action shall be referred to as the "Petitioner."

3. The Petitioner alleged from April 2008 through September 18, 2008, he was harassed by various members of the Employer's Food and Beverage Department. In particular, the Petitioner was allegedly called a "gook, chink and Jap" by the Employer's Sous Chef Mark C. In addition, two of the Employer's Hot Line Cooks racially harassed the Petitioner by pulling their eyes into "slants" and by imitating karate moves, using spatulas as "Samurai" swords. The Petitioner alleged other employees would watch this behavior and either laugh or do nothing to stop the conduct.
4. The Petitioner also alleged that several of the Employer's Sous Chefs, including Jessie A., would take down the posted work schedules and replace them with new schedules so that it would appear as if the schedules had never been changed. The Petitioner alleged the Sous Chefs would notify other non-Asian employees of the schedule changes, but would deliberately fail to notify the Petitioner of the schedule changes. As a result, the Petitioner would arrive to work late and would be disciplined for his late arrival.
5. The Petitioner further alleged in his charge that he was issued written warnings for not signing in and out during scheduled work hours, that the Employer issued the Petitioner written warnings for attendance violations, and that the Petitioner was sent home for not wearing proper work attire. The Petitioner alleged that non-Asians who committed the same violations were neither sent home nor reprimanded.
6. On September 11, 2008, the Petitioner alleged he received a phone call from Sous Chef Jessie A. The Petitioner alleged that Jessie A. informed the Petitioner that the Petitioner was being discharged because he had accumulated eight points in violation of the Employer's Attendance Policy.
7. The Employer denied it had subjected the Petitioner to unequal terms and conditions of employment because of his race. The Employer further stated that the Petitioner had voluntarily resigned.
8. In his Request, the Petitioner argues there is sufficient evidence that he was subjected to unequal terms and conditions of employment and that he was discharged because of his race. The Petitioner attached exhibits in support of his argument, including a statement outlining his experience while working for the Employer and the letter sent to him by the Employer. The Petitioner also states that Jessie A. discharged him in early September 2008, and that four (4) individuals witnessed the Petitioner turn in his uniforms and badge to Jessie A.
9. In its Response, the Respondent argues that the dismissal of Count B and Count C of the charge should be sustained because there was no substantial evidence the Employer had subjected the Petitioner to unequal terms and conditions of employment, and because the evidence showed the Petitioner had voluntarily resigned his position.

Conclusion

The Commission finds that there is substantial evidence of discrimination as to Count B and Count C of the charge. Substantial evidence exists when the evidence is such that a reasonable mind would find the evidence sufficient to support a conclusion. See In re Request for Review of John L. Schroeder, IHRC, Charge No. 1993CA2747, 1995 WL 793258, *2 (March 7, 1995).

As to Count B, the Commission finds there is substantial evidence the Petitioner was subjected to unequal terms and conditions of employment. The Petitioner alleged that non-Asian employees who committed violations of the Employer's policy were not disciplined, while the Petitioner was repeatedly disciplined. The Employer submitted no independent evidence that non-Asian employees were also disciplined for violating the Employer's policy. The Respondent's contention that the Petitioner did not prove differential treatment in this regard is not persuasive because the Employer was in the best position to produce evidence to demonstrate that all of its employees were disciplined equally. Therefore, since the determination of Count B turns on a credibility determination, a finding of substantial evidence is appropriate.

As to Count C, the Commission finds there is a factual dispute concerning whether or not the Petitioner was terminated. The Petitioner alleged that Jessie A. discharged him. During the Respondent's investigation, the Employer did not respond to the Respondent's request to interview Jessie A. The Employer's failure to produce Jessie A., and thus its failure to fully cooperate with the Respondent's investigation, should be construed adversely against the Employer. See Theodore Johnson v. Alert Construction Company, IHRC, ALS No. 8686, 1999 WL 33255054, * 25 (July 20, 1999).

The Employer's correspondence of September 18, 2008, which purports to give the Petitioner until September 26, 2008, before he would be considered to have voluntarily resigned, and which was relied upon by the Respondent, may have been created after-the-fact to provide cover for the actions of Jessie A. Further, during the Respondent's investigation, the Employer's own Director of Human Resources stated that the Petitioner had turned in his badge and resigned on September 12, 2008. Given the factual dispute surrounding the date and manner in which the Petitioner's employment ended, and the Employer's failure to produce a key witness who had knowledge of facts directly relevant to the allegations of Count C, the Commission concludes that a finding of substantial evidence as to Count C is required.

The Commission concludes the Petitioner's Request is persuasive. The matter shall be remanded to the Respondent for further action as herein instructed.

WHEREFORE, IT IS HEREBY ORDERED THAT:

- A.** The Respondent's dismissal of Count B and Count C of the Petitioner's charge is **VACATED**.
- B.** Count B and Count C of the charge are **REINSTATED** and **REMANDED** to the Respondent for entry of a finding of **SUBSTANTIAL EVIDENCE** as to both Counts, and for further proceedings consistent with this Order and the Act.

This Order is not yet final and appealable.

STATE OF ILLINOIS

HUMAN RIGHTS COMMISSION

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Entered this 9th day of March 2011.

Commissioner David Chang

Commissioner Marylee V. Freeman

Commissioner Charles E. Box